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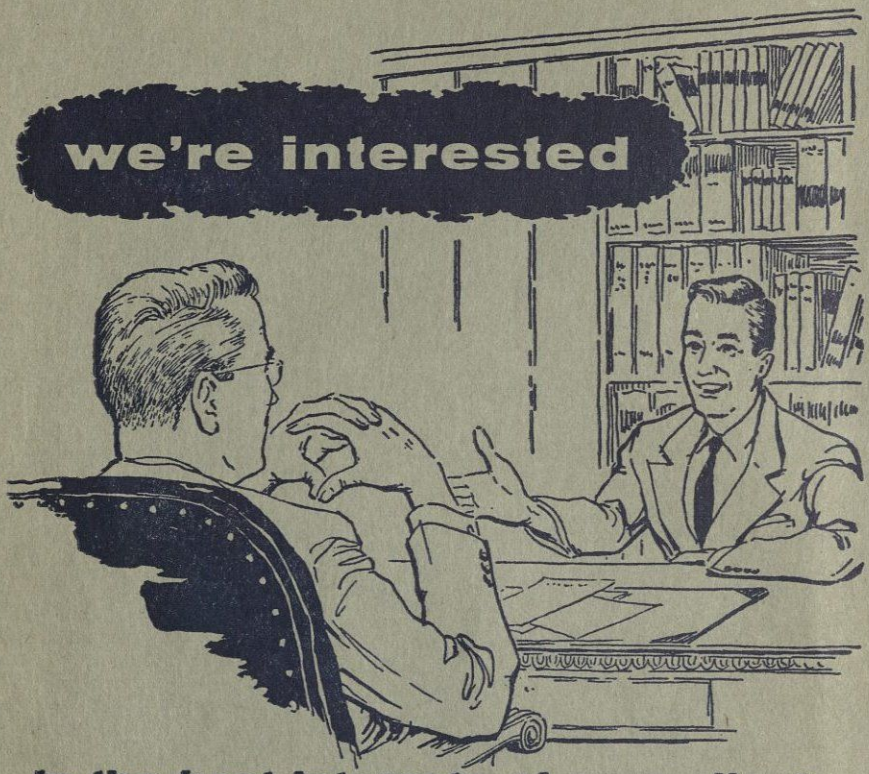

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1956 CONVENTION PROGRAM IS SET AT BROADMOOR HOTEL

The 58th Annual Convention of The Colorado Bar Association will be held October 18 through 20, 1956, at the Broadmoor Hotel, Colorado Springs. The following procedures will be strictly observed in the handling of reservations for this Convention.

1. All requests for reservations must be sent to the Secretary of The Colorado Bar Association, 525 Mile High Center, Denver.

2. No block reservations will be recognized, but each member of the Association desiring reservations must send in his own request by United States mail.

3. Each reservation request must be accompanied by a deposit of $15. This deposit will not be credited to the hotel bill (the Broadmoor has a policy against accepting advances on room rent) but will cover a registration fee of $6 and one ticket each to the Friday and Saturday luncheons ($2.50 each), the Saturday Night Banquet ($4), the President's Reception, the Friday night entertainment, and the Grand Ball on Saturday night.

4. In making your request for accommodations at the Broadmoor, please specify (1) the type of room desired, (2) how many will be in your party, (3) the dates of arrival and departure.

5. On March 15, 1956, all requests for reservations then in the Secretary's office will be opened simultaneously. If the total number of requests accompanied by a proper deposit does not exceed the number of rooms which the Broadmoor can make available, all will be filled. If such requests exceed the number of rooms available, the rooms will be allocated to the various local bar associations, pro-rated according to the membership of each association. Associations having more requests for reservations than rooms assigned may select by lot, or otherwise, the registrants to be approved. Such selection would be made by the local bar association involved, with the results certified to the Secretary of The Colorado Bar Association.

6. Letters requesting reservations will be sent by the Secretary to the Broadmoor Hotel when approved in the above manner. The Hotel will be responsible for the actual assignment of rooms.

7. Deposits will be returned to those not reciving reservations unless they desire to leave their requests on file in the hope of obtaining a reservation canceled by another. Those leaving their deposits with the Bar Association Secretary will receive preference in the assigment of canceled reservations.

8. After a reservation is confirmed NO DEPOSIT WILL BE RETURNED UNLESS A CANCELLATION IS RECEIVED PRIOR TO SEPTEMBER 15, 1956.

No advance deposit will be required of members who do not request reservations at the Broadmoor Hotel. Ample accommodations are available elsewhere in Colorado Springs, and the Convention Committee will provide information at a later date to anyone desiring such facilities.

Requests for accommodations at the Broadmoor Hotel will now be received by the Bar Association Secretary.

CONVENTION COMMITTEE OF THE COLORADO BAR ASSOCIATION

Alfred Heinicke, Chairman

ONE YEAR REVIEW OF COURTS, JUDGMENTS AND PROCEDURE

By DICK BERNICK *of the Denver Bar*

, The case of *Holland v. McAuliffe*[1] dealt with an attack on Denver Ordinance No. 233, Series of 1953. The ordinance gave discretionary power to the municipal court to place a defendant on conditional suspension of sentence or fine for a period not exceeding two years. In the event the municipal court found the defendant to have breached the conditions of suspension it was required to reinstate the original sentence or fine. The ordinance also provided that for purposes of appeal the date of conditional suspension was to be considered the date of final judgment.

Two months before the ordinance in question became effective the defendant was given a fine and jail sentence. The Court suspended the jail sentence and part of the fine on condition that defendant "refrain from driving any motor vehicle for one year from date." More than four months later the Court issued its warrant for defendant's arrest for an alleged breach of the conditional suspension. At the hearing the court modified and reinstated the original sentence and then denied defendant's application to appeal such sentence. Defendant, after an unsuccessful attempt to obtain reversal through certiorari in the Superior Court appealed to the Supreme Court via writ of error.

The Supreme Court held the judgment of the municipal court erroneous on the following grounds:

1)The conditional suspension was unlawful because the prohibition against driving was apparently worldwide thus exceeding the court's territorial jurisdiction of the City and County of Denver.

2) The conditional suspension was unlawful because the one year conditional suspension exceeded the ninety day jurisdiction of the municipal court.

3) Reinstating the sentence under an ordinance which was enacted subsequent to the original sentence and suspension constituted unlawful retroactive procedure.

The Court held that the denial of defendant's right to appeal by the municipal court was erroneous because the defendant had the right to appeal either at the time of the original sentence or at the time it was reinstated and the City could not by the ordinance in question limit appeals of municipal court cases.

In the case of *French v. Haarhues*[2] plaintiffs in error, who were plaintiffs in the trial court, appealed to the Supreme Court on writ of error seeking reversal of a judgment of dismissal. The

[1] 286 P. 2d 1107.
[2] 287 P. 2d 278.

designation of the record included a "direction for entry of judgment" but no designation of the final judgment itself. The record as transmitted to the Supreme Court included the order of dismissal and the order for the entry of the judgment. The judgment itself was not included in the record on error because the clerk either failed to enter the judgment or failed to include it in the record on error despite the fact that Rule 112 provides that the judgment or part thereof to be reviewed shall be included in the record whether designated or not. The Supreme Court dismissed the writ of error because of the absence of a final judgment and in doing so emphasized the responsibilities of an appealing party saying, "The entry of a judgment upon the court's order is a ministerial duty on the part of the clerk, but if a defeated litigant desires a review by writ of error in this court, it is his *duty* to see that the record presented here is properly prepared and completed and contains a final judgment; otherwise dismissal will follow."

In *Ferkovich v. Ferkovich*[3] the wife brought an action for divorce and in connection therewith the Court granted her motion for relief *pendente lite,* ordering her husband to make certain payments for the support of the wife and child. The wife's complaint was dismissed and on appeal to the Supreme Court the dismissal was affirmed. The wife subsequently moved the lower court for a judgment in the amount of the aggregate of her husband's delinquencies under the order *pendente lite* and also petitioned for her costs and counsel fees in the Supreme Court. The lower court denied the motion for judgment and ruled that it had no jurisdiction to grant the petition for costs and fees in the Supreme Court.

On appeal both rulings were reversed. The Supreme Court held the trial court had jurisdiction to entertain the petition for expenditures in connection with the Supreme Court review and therefore had erred when it denied the petition on the ground of lack of jurisdiction. It was held to be error for the trial court to refuse to enter judgment for the past due support installments since those installments constituted a debt against the husband

[3] 274 P. 2d 602.

and the trial court was without authority to enter an order which, in effect, would be a cancellation of the payments in default.

It is interesting to note, in connection with the case of *French v. Haarhues,* above, that the husband here contended that the writ of error should be dismissed because the orders appealed from were not final judgments. The court dispensed with this argument by saying, ". . . the orders were in every respect a finality so far as plaintiff's rights were concerned."

Carrera v. Kelley[4] was the latest in a line of cases emphasizing the limited jurisdiction of county courts in dependency matters. The mother, faced with the necessity of working, had placed the child in the care of petitioner. The petition in dependency alleged that for a period of about one year prior to the time the petition was filed the petitioner had provided the entire care and support of the child. The trial court found that the child was dependent and neglected and that the custody of the child was vested in the court. An order was entered whereby the child was to spend about nine months of the year with petitioner and three months of the year with the mother. The order set out certain conditions and payments the mother was to meet over a period of two years after which period, if she fully complied with the terms of the order, the custody was to be vested in her. The Supreme Court, in a sharply worded opinion, ruled that the petition itself showed that the child was not a dependent or neglected child under the terms of the statute. It was held that there was no showing that the child was neglected or imposed upon, because, on the contrary, the petition showed the child was being cared for by petitioner. For this reason it was held that the trial court had no jurisdiction over the child.

The case of *Miller v. Singer*[5] was an action in which the complaint and evidence charged the defendants as joint tortfeasors. The trial court instructed the jury that joint tortfeasors were "jointly and *separately* liable" instead of the usual "jointly and *severally* liable." The trial court then submitted two forms of verdict by which the jury was permitted to and did in fact return separate verdicts in different amounts against various defendants. The Supreme Court held that the above instruction and the approval of the verdict in separate amounts constituted error, reciting the general rule that, "Where an action is brought against joint tortfeasors, if . . . the finding is against all of them, the verdict must be a single verdict against all for a single sum and not a several verdict against each defendant either for the same or separate sums."

In the case of *People v. Griffith*[6] the defendant was arrested and taken into custody without a warrant and an information was filed against him in the County Court charging him with

[4] 263 P. 2d 162.
[5] 279 P. 2d 846.
[6] 276 P. 2d 559.

driving while under the influence of liquor, speeding and leaving the scene of an accident. The defendant moved for dismissal, relying on Sec. 290, Ch. 16, '35 C.S.A. which directed that in cases concerning the offenses with which he was charged "the arrested person shall be immediately taken before a magistrate." The defendant argued 1) that the County Court had no jurisdiction over the charges made against him because the above quoted portion of Section 290 conferred exclusive jurisdiction on justice of the peace courts, and 2) that County Court had no jurisdiction over the person of the defendant since he was arrested without warrant and was not taken immediately before a magistrate. The County Court dismissed the information and the State appealed. The Supreme Court reversed the dismissal holding that the language of Section 290 did not repeal the statute conferring original jurisdiction upon county courts in misdemeanor cases, and that even if the arrest was illegal it did not deprive the Court of jurisdiction over the person of the defendant.

The case of *National Motor Finance Co. v. DeMarco*[7] involved an attempted appeal from a judgment of a justice of the peace court to the county court. Instead of filing an appeal bond substantially in the form prescribed by statute (C.R.S. 1953 79-13-13), counsel for the appealing party filed his check and a petition for supersedeas. The petition for supersedeas did not contain certain information required in the statutory form of appeal bond,

[7] 287 P. 2d 265.

such as the name of the justice of the peace and the date of the justice court judgment. The Supreme Court held that the County Court never obtained jurisdiction, on two grounds:

1) A litigant cannot deposit money or a check as security for the prosecution of an appeal, instead of entering into an undertaking where the statute prescribes the form of the bond.

2) The petition was lacking in essential allegations, and the deficiency was not satisfied by any subsequent happenings.

The case is also significant for the Court's statement that the defendant's appeal bond in a justice court replevin action must be in an amount at least *equal* to the established value of the propperty replevined and costs. The statutory form of appeal bond prescribes a bond in *double* the amount of judgment and costs.

In the case of *American Furniture Company of Denver v. Veazie*[8] the buyer brought an action against the seller of a gas stove to recover damages for injuries she sustained as a result of the explosion of the stove. The complaint contained two causes of action for the same injury; one upon the basis of implied warranty of fitness, and one based on negligence. The court submitted three forms of verdict to the jury; one for the plaintiff on her first cause, one for the plaintiff on her second cause and one for the defendant, with the instruction that the jury should return but one verdict. The jury returned two verdicts for the plainiff, one on each claim, which verdicts were accepted by the court. On appeal, the Supreme Court reversed the judgment on the proposition that plaintiff was not entitled to recover on two theories for one injury.

In its opinion the Court suggests that the trial court should have submitted two forms of verdict for the first cause of action, one for the plaintiff and one for the defendant, and two forms of verdict for the second cause of action.

A somewhat related situation was presented in the case of *Hood v. The People.*[9] In that case three counts of an information were submitted to the jury. The court submitted three separate forms of guilty verdict, one on each count, and but one form of not guilty verdict. The defendant was found guilty on one count and on appeal argued that the trial court erred in not submitting separate forms of not guilty verdict as to each count. The Supreme Court held in this case that submitting three forms of not guilty verdict would have been mere surplusage and that no error was committed.

[8] 281 P. 2d 803.
[9] 277 P. 2d 223.

In the case of *Rinn v. City of Boulder*[10] the defendant was found guilty in Police Court of violations of Boulder municipal ordinances and the defendant appealed to the County Court. The defendant filed various motions and a request for a jury trial. The motions were denied and the defendant was allowed ten days in which to file an answer. The defendant failed to answer and the County Court dismissed the appeal. The Supreme Court held that the dismissal was error.

The opinion holds that no answer is required in such a case because the issues are framed by the perfection of the appeal from the Police Court and the County Court merely tries *de novo* the issues made in Police Court.

In the case of *Dickerson v. Cary*[11] the plaintiff brought an action against the defendants to foreclose a defaulted deed of trust. The defendants had previously commenced an action in another court asking damages for fraud in connection with the same sale contract in which the deed of trust was given. On defendant's motion the court stayed the plaintiff's foreclosure proceedings indefinitely or until disposition of the damage suit. On appeal it was held that the stay was improperly granted since the defendants had acknowledged their liability when they elected to sue for damages rather than recission of the contract. The opinion also held that the stay was erroneous because the disposition of one action would not determine all of the issues of the other and the suits were therefore not identical.

In *Trujillo v. District Court*[12] the petitioner was charged with the misdemeanor of involuntary manslaughter. Bail was set at $2000.00 and petitioner was released on bond. Upon the return of a guilty verdict the court, on its own motion, ordered the petitioner remanded to custody, discharged the bond and denied his motion to remain on bond until the disposition of his motion for a new trial.

The petitioner then brought an original proceeding in the Supreme Court for a ruling upon the District Court to show cause why he should not be released on bond. The order to show cause was issued and in response thereto the District Court filed an answer setting out that the admission to bond after verdict was a discretionary matter and that it was the settled policy of the court to refuse all bonds after conviction and before sentence in such cases. The Supreme Court agreed that whether the bond should be allowed to remain in effect after verdict was a discretionary matter, but held that following a rigid policy regardless of the facts or circumstances did not constitute an exercise of discretion. Since the undisputed facts were that the petitioner had lived in the state all his life, and not one scintilla of evidence

[10] 280 P. 2d 1111.
[11] 285 P. 2d 831.
[12] 282 P. 2d 703.

adverse to his reputation and character had been brought out in his trial, the District Court was ordered to reinstate the bond.

In the case of *Maniatis v. Stiny*[13] an action for accounting in District Court was referred to a master and trial was held before the master. The master made his report and objections thereto were filed by the defendant. The nature of the objections were such that the District Court could not properly pass upon them without a reporter's transcript of the evidence introduced before the master. However, no such transcript was supplied for the judge's information in ruling on the objections. The judgment was reversed on the ground that the trial court lacked authority to pass upon the defendant's exceptions without examining the evidence taken before the master.

The case of *Smith v. Wagner*[14] was really an affirmance of the lower court without an opinion except to correct an obvious mathematical miscalculation in the judgment. In so doing the Supreme Court reenunciated the familiar rule that the trial court, having seen and heard the witnesses testify, is the best judge of their credibility and therefore its findings upon conflicting testimony are presumed to be correct and may not be disturbed except to correct manifest miscalculation.—*D. B.*

[13] 274 P. 2d 975.
[14] 279 P. 2d 1057.

The Dicta staff wishes to announce that commencing with the 1956 March-April Issue, a picture of the author and a biographical sketch will be published with each article. It is requested that all future contributors of material include a 5x7 photograph and a "brief" biographical sketch with their articles. Persons who have previously submitted material which has not yet been published will be contacted individually by the Student Article Editor for their pictures and sketches.

ARNOLD M. CHUTKOW, Editor

ONE YEAR REVIEW OF APPEALS AND AGENCY

BY MAURICE REULER, *of the Denver Bar*

During the year last preceding there have been a great many cases covering the subject of appellate procedure which have been decided by our Supreme Court, but only two cases covering the field of agency. Therefore, this article will be devoted primarily to a consideration of the problems faced by the practitioner when he gets ready to appeal a case to the Supreme Court of Colorado. In general, the author will use the term "appeal" and "Writ of Error" interchangeably unless otherwise noted.

Turning first to the matter of appellate procedure one is reminded of the admonition given by a law school professor to his class in civil procedure. Namely, that clients do not, as a rule, come to lawyers' offices in order to find out what they should do, they come to lawyers' offices in order to find out how to do it. The matter of procedure is clearly the "how" of the practice of law. To paraphrase the old saying, "while procedure may not make the case, it clearly helps it."

The writer has divided this subject into seven separate headings as a matter of convenience in classification. The first heading which we will cover is that of Judgments.

Surely there is not a lawyer in the State of Colorado who does not know that the primary object of a lawsuit is to secure a judgment, and that if the judgment is secured he may then perhaps, execute on same. It would follow, therefore, that if judgment is secured in the Trial Court, the next end to attain is to see that that judgment is sustained in the Supreme Court. In order to do this it necessary that a proper record on appeal be prepared. Our Court, in the case of *Ruth King and Joe King* vs. *Frank Williams,*[1] ruled that the length of time within which a defeated litigant may secure a Writ of Error in the Supreme Court is three months[2].

Here it appeared that on August 6th, 1954, verdict was had for the defendant. On the 24th day of September the Trial Court denied motions for a new trial and entry of judgment notwithstanding the verdict. At that time, the Trial Judge requested the winning attorney to prepare a formal order of judgment. The formal order was not filed in the District Court until the 11th day of October. On the 8th od December counsel for the defeated litigant filed a motion to extend the time within which to prepare the transcript. The motion was granted and on the 11th of January a praecipe was was issued. It should be noted that the praecipe was filed exactly three months from the date of the *entry* of the final order of judgment in the Trial Court.

Mr. Justice Clark sustaining a motion to dismiss, ruled "that

[1] C.B.A. Ad. Sh. Vol. 7, No. 8, Pg. 271, 1955.
[2] Colo. Rules C.P. 111(b).

the sole question here is at what date did the judgment become effective and final. A judgment is binding and effective from the time of its pronouncement, although not actually entered into the record until later." (Page 272) Mr. Justice Clark emphatically states that it is the *statement* of the Court that judgment is *entered* that constitutes the judgment and that it is from that day that time will run.

The entry of judgment is ministerial and unless a Writ of Error is taken out within 90 days from the date of pronouncement of judgment, Writ of Error will not lie. This case illustrates the point that counsel cannot be too careful in computing the time within which he must perfect a Writ of Error to the Supreme Court.

In another interesting decision *Byrdie W. Johnson* vs. *Harry A. Johnson*,[3] the following occured: In what appeared to be a tort action, complaint was filed on March 22, 1949. Answer thereto was filed November 30, 1951. On January 15, 1954 the defendant filed a motion to dismiss the complaint for failure to prosecute, "pointing out" that four terms of court have passed since the matter had been at issue; that said matter has been at issue for more than two years without any diligent prosecution by any of the plain-

[3] C.B.A. Ad. Sh. Vol. 7, No. 13, 1955.

tiffs or their attorneys (Page 491). The Court heard this motion, and on the 22nd day of January, 1954, found, "that defendant's motion is well taken," and ordered, "that it be and is hereby granted and the case is hereby dismissed." The Court then gave sixty days in which to file a Bill of Exceptions and tender a trascript.

On the 5th day of March of the same year, the plaintiff filed a motion for vacation of the judgment of dismissal, and on March 8th the Trial Court entered said motion by way of order granting same. On the 29th day of March the Trial Court reconsidered the defendant's original motion to dismiss for failure to prosecute and on that day it entered inter alia the following findings: "It is hereby ordered, adjudged and decreed that the motion be sustained and that the complaint of the plaintiff filed herein be dismissed."

The plaintiff had had several different counsel, and on June 18th new counsel filed a motion for "Relief From Judgment" relying on provisions of Rule 60(b) (1) (2). On the 7th of September, 1954, the Trial Court again entered extensive findings followed by a document entitled "Judgment." In said document the Court stated "It is therefore ordered, adjudged and decreed by the Court that the motion for relief from judgment filed by Byrdie W. Johnson and heard September 7, 1954, be denied." Thereafter, counsel for the plaintiff, on the 6th of December, approximately 89 days sub-

sequent to the entry of the order of September 7th, filed praecipe for Writ of Error.

Our Court, in ruling on the question under a motion to dismiss stated "the question presented on this issue is when was a final judgment entered by the Trial Court . . . the final determination of the cause is a judgment whether the relief granted is legal or equitable."[4] "Any action by which a Trial Court terminates the proceeding is a final judgment . . . now the Court considers what was the action of this Trial Court that terminated the case. Was it the document entitled "Judgment," or was it the entry and pronouncement of its order of March 29th, dismissing the case under the defendant's motion to dismiss for failure to prosecute. The Court notes that the so-called judgment of September 7th goes merely to the question as to whether plaintiff was entitled to relief from the judgment theretofore entered." The Court states, "it has been held that the character of an instrument, whether a judgment or an order, is to determine by its contents and substance and not by its title" (Page 492).

The Court then notes that it is unfortunate that counsel was misled by this document, but that under Rule 60(b), "that a motion under this subdivision does not affect the finality of a judgment or suspend its operation . . . such motion in any event is directed to the discretion of the Trial Court, and when one files such a motion he admits for all practical purposes that the judgment is in all respects regular on the face of the record, but asserts that the record would show differently except for mistake, inadvertence or excusable neglect on behalf of counsel or client. No such showing was here presented. If it be that probable error appears in the record, then, of course, proper procedure indicates a review upon writ of error procured within the prescribed period of time following the entry of final judgment" (Page 493).

In the instant case a most difficult problem seems to be presented, for here we have a situation in which after judgment of dismissal is entered counsel for the defeated litigant seeks review of same by an appropriate motion under Rule 60(b). In the interim, the time in which counsel would have to take a writ of

[4] 49 C.J.S, Pg. 26.

error under Rule 111(b), from the decision of the Trial Court granting the motion to dismiss, is running, so that within 90 days from the date of the granting of the motion, the right to appeal to the Supreme Court by Writ of Error is gone. In the instant case, indeed, the right to appeal to the Supreme Court under the ruling of the Court herein, had lapsed prior to the ruling of the Trial Judge on the motion to set aside its previous judgment of dismissal. The Court, through Mr. Justice Clark points out that the proper procedure is to file an independent action in the Trial Court. In the interim, taking the case, to the Supreme Court.

This, of course, would appear to be proper procedure, but the writer wishes to point out that where counsel finds himself in a position in which he believes a motion under Rule 60 should be filed, and particularly 60(b) thereof, that he should certainly do one of two things: Request the Trial Court to determine the matter speedily in order that the 90 day period within which to docket in the Supreme Court will not elapse prior to the determination by the Trial Court under Rule 60(b), or (2) he should file an independent action.

The writer would also note that there appears to be a hiatus in the rules under this problem in this respect. Suppose that a motion under Rule 60(b) to set aside a judgment is filed in apt time; suppose also that counsel, heeding the instant case, dockets within 90 days the case in the Supreme Court; suppose that subsequent to the docketing of the case in the Supreme Court the Trial Court determines that its previous judgment was in error, and reverses same. The question then arises, what is counsel to do? Has the Trial Court continued jurisdiction after the docketing of the case in the Supreme Court? And, if so, may the counsel substiute th new judgment of the Trial Court for the judgment of the Trial Court theretofore entered in the matter docketed in the Supreme Court? To the writer, at least, the rules are not clear, unless the phrase in 112(a) governs as to filing of a supplemental record.

Having considered the cases cited during the past year, within which the question has arisen as to the date from which the time for Writ of Error runs, we come now to the next important con-

sideration, and that is the state of the record itself. There have been two decisions concerning a matter which appears to have given lawyers difficulty and that is: What must be in the record insofar as the question of a final judgment is concerned? Our Court has held that the final judgment, as such, must be a part of the record. In the case of *W. B. Sutley vs. Glenn C. Davis and Roy S. Lofton,*[5] the following occurred: This was a condemnation proceeding in which commissioners were appointed. The commissioners found that there was no necessity for the condemnation, and the counsel for the plaintiff moved to set aside the findings. The Trial Court, on the 12th day of September, denied the motion and declared that a rehearing was dispensed with. Within the proper time counsel for the plaintiff tendered and had the record and the reporter's transcript of the evidence before the commissioners approved by the judge. Nothing further was in the record. Our Court citing Rule 112(a) states: The record shall contain. "the material pleadings without unnecessary duplication the verdict, or the findings of fact and conslusions of law, together with directions for the entry of judgment thereon. The master's report, if any. The opinion, if any. The judgment or part thereof to be reviewed and the designation or stipulation of the parties as to the matters to be included in the record." The Court pointed out that no judgment appeared in this case; that therefore, dismissal followed. The writer cannot urge too strongly upon his brethren the need for careful study of the rules pertaining to appellate practice in order that the pitfall herein illustrated and others like it may be avoided.

Again, in the decision of *Edward L. French and Dorothy French vs. Art L. Haarhues and Roy N. Jones,*[6] the Court pointed out that a designation for a direction for entry of judgment but no designation for any final judgment as shown on the designation of record in error is a fatal defect and the Court again cites Rule 112, stating that the judgment itself must appear as part of the record; that to designate the entry of judgment is not sufficient, since that is merely a ministerial duty devolving upon the

[5] C.B.A. Ad. Sh. Vol. 6, 1955.
[6] C.B.A. Ad. Sh. Vol. 7, No. 13, 1955.

clerk of the Trial Court after the judgment itself has been entered. The writer would suggest that in every case in which counsel feels that there is the slightest chance that the matter will be appealed to the Supreme Court, counsel should prepare findings of fact, conclusions of law and a judgment. If such is done, the question presented in the instant case and in the previous cases cannot arise.

An interesting matter that has come up to our Court within the past year has involved the proper parties to an appeal; that is. who may take a writ of error to the Supreme Court? In the first of these cases, *Mayme Schoenewald vs. Louis Shoen, et al,*[7] we had the following situation: A complaint for damages in which a third party complaint was filed. Third party defendants then proceded by motion to dismiss and the Trial Court entered an order dismissing without prejudice, the third party complaint. Third party plaintiff thereupon proceeded by writ of error to the Supreme Court. The Supreme Court held that the order of a trial court dismissing without prejudice a third party complaint is not a final judgment from which writ of error can lie under Rule 11. Again in *Elwood Edwards, Inc., a Colorado corporation and Elwood Edwards vs Hugo F. Sill,*[8] the court ruled that where the real party in interest does not take a case to the Supreme

[7] C.B.A. Ad. Sh. Vol. 7, No. 12, 1955.
[8] C.B.A. Ad. Sh. Vol. 7, No. 10, 1955.

Court, nor is a party therein, appeal to the Supreme Court by Writ of Error will not lie at the behest of a nominal party.

Although there has been but one decision in our Court within the past year considering the general state of the record. still it cannot be over emphasized that precision is needed in the perfecting of the Writ of Error and in the compilation of the record upon which the Supreme Court will sit in judgment. Perhaps many of us who know full well that the Trial Court having witnesses before it, may many times reach judgments where we have committed errors in procedure and unfortunately let this habit slip into our practice in front of the Supreme Court. The thing which counsel must keep in mind is that the Supreme Court passes judgment solely upon the record, occasionally supplemented by oral argument, and that the record may appear vastly different from the actual trial in the nisi prius court.

In the decision of *Bernard E. Teets, et al, vs. Lee T. Richardson, individually, and doing business as Western Commission Company.*[9] The Court, through Mr. Justice Bradfield, in a short opinion points out that the matter could be decided, "by dismissal of the writ or error because of failure of compliance with the pertinent rules of procedure, or upon the merits." The court points out, that the record is defective in at least the following respects: "It contains only the pleadings filed by the parties, and the finding and judgment of the Trial Court. There was no transcript and no exhibits attached thereto." The Court states, "that without a transcript of the evidence (in effect being unable therefore to construe the exhibits as well) the presumption is that the judgment is supported by the evidence." This case well illustrates the fact that if the record in complete detail is not before the Court the chance for reversal is correspondingly lessened. One could almost say that it is better to have a sloppy record, provided that it is complete, than to have none at all, or one that is quite incomplete.

The next matter considered by our court, and one which has formerly taken a considerable portion of its attention from time to time, with respect to appellate procedure is that of original jurisdic-

[9] C.B.A. Ad. Sh. Vol. 7, No. 11, 1955.

iton. There has been but one decision within the past year in this field. *Arthur J. Kemper vs. The District Court of the City and County of Denver in the Second Judicial District, the Honorable Joseph E. Cook, one of the Judges thereof, and Hazel I. Kemper,*[10] In this decision, pursuant to Rule 116, the petitioner sought to invoke the original jurisdiction of the Court in a divorce matter in which an interloctuory decree had been entered by an unverified petition. The Court set aside the interloctuory decree and informed petitioner that he would have 15 days within which to tender the record, or 15 days within which to answer. Petitioner did neither, but rather went to the Supreme Court under Rule 116. The Court points out, "the fact that a Court has erroniously granted or denied a change of venue, or is otherwise proceeding without or in excess of jurisdiction will not be regarded as sufficient to invoke Rule 116," and states further, "that a Writ of Prohibition is not to be granted except in matters of great public importance." The present one is not such a matter. The Court properly points out that here petitioner could have proceeded in one of two fashions: Either by answer, or by tendering the record and proceeding on Write of Error. He did neither and therefore suffered the result above.

Within the past year there have been two cases considering the question of the record in a criminal case before the Supreme Court of this state. It should be noted at the outset that the Rules of Civil Procedure do not apply in criminal cases, and that it is up to counsel representing a defendant in a criminal case to be prepared pursuant to statute to represent his client in the proper procedural fashion. In the first case the defendant was found guilty of driving under the influence of intoxicating liquor. He was so found by a jury empaneled in the County Court. His counsel appealed to the Supreme Court under Writ of Error. The Supreme Court noted that there was no bill of exceptions; that in the motion for new trial the only grounds stated were, "that the complaint was erroneous and prejudicial, the testimony of a witness was incompetent and the sentence was contrary to law." The Court notes that pursuant to Vol. 1, 53, C. R. S. Page 120, there must be:

[10] C.B.A. Ad. Sh. Vol. 7, No. 9, 1955.

(1) Assignments of Error; (2) the record must contain objections to evidence or other matters of which the defendant complains; (3) the record must disclose exceptions to all adverse rulings with which defendant complains (Page 157).

Again in the case of *Pete Joe Narango, also known as Pedro Jose Narango vs The People of the State of Colorado,*[11] the Court points out that when a criminal case is tried in the County Court, appeal does not lie to the District Court, but only lies to the Supreme Court by Writ of Error.

These then are the cases which have been decided by our Supreme Court within the past year covering the question of Appellate Procedure. The Rules of Civil Procedure state the rules of the game and it is up to us as attorneys, if we are to do the best job for our clients, to abide by same.

There have been but two cases decided in the Court within the past year covering the field of agency. In the first of these, *Olson Manufacturing Company, an Idaho Corporation, vs. Charles Corsentino, et al,*[12] we have a rather involved fact situation, but a basic principal of law to determine the controversy. Here the defendant manufacturing company attempted to sell beet harvesters through-

[11] C.B.A. Ad. Sh. Vol. 7, No. 1, 1954
[12] C.B.A. Ad. Sh. Vol. 7, No. 7, 1955.

out the northern part of Colorado. In particular, their attempts led them to stage a parade through the City of Brighton. At the parade was some official of the Platte Valley Motor Company, who became interested in the disposition of these harvesters.

Thereafter an agreement was entered into between the Olson Company and the Platte Valley Company. Olson brought the machines to the Platte Valley, some from its plant and from the territory involved. They were reconditioned by Olson at Platte Valley, and Platte Valley was to pay Olson for the machines only if and when sold. Olson dictated and controlled the sales price and fixed the amount of commission to be paid or retained by Platte Valley at the time of sale. Olson made the arrangements for sale and the method of sale, agreed to recondition the machines, specifically set out the method of remittance, to wit, by Platte Valley and further, in case of unsold machines, it arranged for their storage and reserved a right to dispose of them elsewhere. Olson also consigned a store of parts to Platte Valley. (Page 224).

It appears that Platte Valley sold several of the machines, but none of them worked. As a result this suit was instituted, not only against Olson, but against Platte Valley. The Court states that the sole question here is, "that of agency" (Page 223). The Court analyzes these facts and concludes, "that this was a matter of consignment; that Platte Valley was the agent of the Olson Company, acting within the scope of its employment. That therefore, the Olson Company was liable, whereas the agent was not."

An interesting decision coming under this heading is *Tracy Moore vs Joseph A. Skiles.*[13] This case should be of interest to all attorneys who try tort cases involving automobile collisions. The facts appeared to be as follows: The plaintiff and her husband were driving back from a party which they had attended at Dotsero, Colorado. While on a narrow shelf road at a blind curve they either struck or were struck by the defendant. The plaintiff passenger thereupon sued the defendant. The defendant answered, setting up the defense of contributory negligence, unavoidable accident and the

[13] C.B.A. Ad. Sh. Vol. 7, No. 1, Pg. 5, 1954.

Family Car Doctrine. Trial was to a jury and the jury left each party where they found them. The Court states: "The primary question is when a husband and wife are journeying together in a vehicle jointly owned by both and engaged in a mission with a purpose common to both, can the negligence of the husband in operating the vehicle be imputed to the wife" (Page 6). The Trial Court had submitted the following instruction, "in this case if the jury finds and believes from a preponderance of the evidence that each driver was guilty of negligence which contributed to the proximate cause of the accident and that the accident would not have occurred but for the combined negligence of both drivers, then the plaintiff cannot recover for the damages which she claims to have suffered, and the defendant cannot recover for the damages which he claims to have suffered" (Pg. 6). In a well reasoned opinion, our Court adopts the principal of imputed negligence, which is in effect, set out in that instruction. The Court points out that where two parties, husband and wife, are engaged in a common venture, where the right of control may be exercised by either, then the negligence of a driver should be attributed to the passenger. The Court points out that had this car stood in the name of either husband or wife, the Doctrine of the Family Car would have prevailed and the wife of plaintiff could not have recovered; that it recognizes that authorities are divided on the question of imputed negligence with respect to the non-driving passenger, but that in its opinion a common sense view requires that the owner or joint owner riding as an occupant in his own car, using the car for a purpose in common with the driver, is presumed to have a right to control the driver and a right to manage and direct the movements of the car. "Where joint ownership of the car is shown, where joint occupancy and possession of the vehicle is admitted and where the occupant owners of the car use it on joint missions the driver will be presumed to be driving for himself and as agent for the other present joint owner" (Page 9).

Further, in a situation such as the present there is a presumption of imputed negligence; that is of joint control and management.

It should perhaps, therefore, be noted so far as counsel who may be trying this type case are concerned, that hereafter the question of imputed negligence might be raised by affirmative defense; where counsel can find from discovery procedures that the car appears to be jointly owned or that there appears in one manner or another to be joint control of the car; that the parties are on a common enterprise. If these things are shown the presumption will arise and the burden will be upon plaintiff, to overcome it.

In conclusion, it can be said that not only as to agency but also as to the field of procedure, there has probably been very little new law written within the past year. Rather, there has been a return, particularly with respect to appellate procedure, to the rules as written with a requirement that there be a more strict adherence to same upon the part of trial counsel. It behooves us all, therefore, to know all the rules as well as the substance of the law prior to the representation of any client on a given case.—*M. R.*

Dicta is undergoing a major reorganization.

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As in any good remodeling job it was necessary to strip down to the framework, tear out weak joists and underpinnings, and then rebuild.

This issue is a transition effort, and we confidently expect to be back to normal size and editorial content with our next issue.

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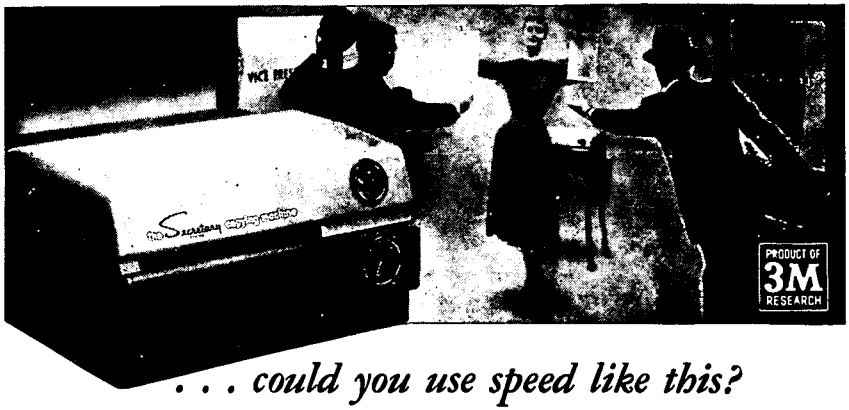

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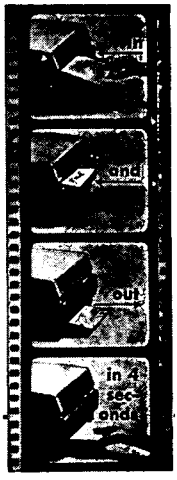

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ONE YEAR REVIEW OF EVIDENCE DECISIONS OF THE COLORADO SUPREME COURT

By WILLIAM DOYLE *of the Denver Bar*

Presented herewith is the annual review of evidence decisions. It will be noted that there are numerous decisions in this field, and due to this and the consequent length, comments have been eliminated. It is hoped that these brief abstracts will prove helpful.

IMMATERIAL AND PREJUDICIAL TESTIMONY

Huggins vs. Campbell[1]

Paternity action. Defendant's counsel cross-examined the mother on her relations with other men prior to the date of conception, claiming that petitioner herself had opened the door in direct examination.

The Court said the matter of petitioner's relationships with other men was immaterial since the relationships were prior to the period of gestation. It was further held that the witness could not be discredited on matters immaterial to the issue on trial. To continually question petitioner about such issues was held to constitute prejudicial error.

INSUFFICIENCY OF EVIDENCE

Hice vs. Pullum[2]

Plaintiff sued Defendant for water damage done to Plaintiff's apartment, claiming Defendant's son was responsible. Water from an upstairs bathroom was left running and damaged Plaintiff's downstairs apartment. The only evidence indicating that the little boy was guilty was that in the past he had been seen playing in the bathroom. Other persons had access to the bathroom. The County Court gave judgment for Plaintiff direct. In reversing this judgment, the Court said there was not a word of testimony connecting the incident to the little boy or any member of Defendant's family. Defendant's motion for directed verdict should have been granted. There was not a scintilla of evidence connecting the tort of the child, if the child committed a tort, to the parent.

Alley vs. Troutdale Hotel[3]

The attorney for Defendant, in his opening statement, stated that the evidence would show that Plaintiff was subject to epileptic seizures which could have caused the injury which Plaintiff was suing on. The only evidence introduced was a statement by Plaintiff's wife that a doctor had seven years before told Plaintiff he had had such a seizure and testimony by a doctor who examined Plaintiff after the accident that the injury *could have* been caused by such a seizure, based to some extent on what Plaintiff's wife had told the doctor concerning what the other doctor had told

[1] C.B.A. Ad. Sh. Vol. I, Pg. 3, 1955.
[2] C.B.A. Ad. Sh. Vol. II, Pg. 74, 1955.
[3] C.B.A. Ad. Sh. Vol. VII, Pg. 211, 1955.

Plaintiff's wife seven years earlier, together with the doctor's observations plus the history given by the family at the time.

Court said the testimony on the epileptic seizure should have been stricken because it was hearsay. A judgment based on a finding of fact based on conjecture and possibility only, cannot be sustained, and the case is reversed.

Dawkins vs. Chavez[4]

Action in wrongful death in which the issue was the sufficiency of the evidence to establish the identity of the Defendant as the driver of the lethal automobile. A witness at the scene identified the car and a waitress at a near-by drive-in testified that Defendant had ordered beer there 15 minutes before the impact. This witness testified that she had identified Defendant in a police line-up as the identical man. It was held not to be error to receive this testimony. The identification is an unsworn, out of Court act and the fact that the witness is cross-examined at the trial does not detract from its hearsay character. Nevertheless, it is received, and properly so, because it is trustworthy.

RES GESTAE

Boney vs. People[5]

Charged with murder, assault to rape, and forcible rape, Defendant pleaded not guilty. The victim died about 24 hours after the attack due to allergic reaction to novocaine while an attempt was made to repair some damage to her vagina and the murder charge was disposed of on a directed verdict. The Court admitted some statements made by the victim to a doctor who examined her the day after the attack, and also admitted some statements made by the victim to a deputy sheriff the following day concerning the place the attack took place. The statements to the sheriff were the only evidence introduced on venue.

The Court said that the testimony of the doctor and that of the deputy sheriff was hearsay and was not a part of the *res gestae*. It was not spontaneous nor was it voluntary since it was given in reply to questions. Without this testimony, the State's case was insufficient. This was a mere narration of the events and hence was inadmissable.

PAROLE EVIDENCE

Rocky Mountain Fuel vs. Providence[6]

Plaintiff sued Defendant for loss of a building and contents, covered by fire insurance. The original policy set forth a list of buildings and their contents, one of which was the "Casero Building," which was insured for $10,000.00 with contents. There were 14 other buildings. The building was destroyed by fire and Plaintiff claimed a loss of $72,000.00. The increase was occasioned by moving equipment from other buildings to the one destroyed. The policy had been endorsed as follows: "The occupancy of all buildings

[4] C.B.A. Ad. Sh. Vol. VII, Pg. 423, No. 12, 1955.
[5] C.B.A. Ad. Sh. Vol. III, Pg. 84, 1955.
[6] C.B.A. Ad. Sh. Vol. III, Pg. 90, 1955.

shown on the form is amended to read 'Machinery Warehouse' with the exception of Item 8." The "Casero Building" was not Item 8. Plaintiff offered to show that the equipment would be insured wherever it was located. Defendant claimed this was a violation of the parol evidence rule since the policy was clear, and the trial court upheld Defendant's contention.

Court said the endorsement was ambiguous and parol evidence could be used to explain the endorsement. If the original policy had not been changed, there would be no need to attach the endorsement. Thus, the trial court erred in not admitting testimony on what the endorsement meant.

McGuire vs. Luckenbach[7]

Here the parties entered a contract providing that the Defendant would operate certain mining properties and that profits and losses would be shared equally. In an action by the Plaintiff to recover one-half (½) of the profits, the jury decided that the Defendant was not legally bound notwithstanding the contract since it appeared that Defendant had no actual interest in the operation--that his father-in-law was the real party in interest. In upholding the refusal to exclude oral evidence as to the true relationship and in holding that the parol evidence rule was not applicable, the Court invoked the exception to the parol evidence rule which allows a party to prove that the written contract was a sham and that the true agreement was oral.

BEST EVIDENCE

Miles vs. People[8]

Defendant was charged and convicted of aggravated robbery and conspiracy to commit aggravated robbery. The bill of exceptions to the Supreme Court failed to contain two exhibits which were confessions and which could not be found, and which appeared to be lost. The District Attorney produced carbon copies of the confession, signed by Defendant and each page initialed by Defendant.

[7] C.B.A. Ad. Sh. No. 17323.
[8] C.B.A. Ad. Sh. Vol. V, Pg. 163, 1955.

Court said that when the originals are lost, carbon copies of exhibits which are identical, can be used by the Supreme Court on its review. If there is any question about the identical nature of the exhibits, the question will be referred to a master.

RELEVANCY - CIRCUMSTANTIAL EVIDENCE

Bilorsky vs. Bilorsky[9]

Divorce action by husband against wife and separate maintenance by wife against husband. Wife offered to show that husband had written a compromising letter to some other woman, by introducing the letter. Husband admitted writing the letter, but the Court refused to admit the letter in evidence. Divorce granted husband.

On review, the Supreme Court determined that it was error to exclude the letter because it showed that the husband was associating with other women, and also showed that the husband did not leave home solely because of the wife—that he had another motive.

ADMISSIONS - EXCULPATORY STATEMENT INDEPENDENTLY PREJUDICIAL

MacRae vs. People[10]

Defendant charged and convicted of aggravated robbery after pleading not guilty. Defendant objected to testimony at the trial, given by police officers who questioned him about large amounts of money he had. His answer to the questions was that he had saved it while in Canon City Penitentiary. Defendant did not take the stand, but the statements made while talking to the police officers were admitted.

The Court said the statement was an admission against interest made voluntarily and the entire statement could be admitted, including the reference to Defendant's past conviction.

STATEMENTS OF COUNSEL

Veto LaRocco and Lucy LaRocco vs. Joe Eliseo et al[11]

The action was one for alleged negligence in connection with an automobile collision. The trial court had dismissed the action at the end of Plaintiff's case where there was a failure by Plaintiff to prove how the accident happened. A was passing B and while

[9] C.B.A. Ad. Sh. Vol. VIII, Pg. 254, 1955.
[10] C.B.A. Ad. Sh. Vol. IX, Pg. 280, 1955.
[11] C.B.A. Ad. Sh. Vol. IV, Pg. 130, 1955.

doing so, side-swiped B and hit C head-on. The opening statements of counsel for A and B, while not admitting negligence, did bring out that the collision occurred in this manner. The Supreme Court per Holland, held that the admissions of counsel in the opening statements were binding on their respective clients and consequently, the trial judge erred in dismissing the complaint for lack of evidence.

Res Ipsa Loquitur:

It was further concluded that the case was a proper one for the application of the doctrine of res ispa loquitur. *Comment*: This part of the decision is very interesting because in the normal *res ipsa* situation there is a single Defendant and there is no question, but that he had control of the instrumentality which caused the injury, and the issue concerns *how* it happened. However, where one of several Defendants perpetrated the wrong, it would seem proper to require each to make his explanations and to not penalize Plaintiff because he is unable to isolate the wrongdoer.

BLOOD ALCOHOL

McRae vs. People[12]

Holding that a blood alochol test was inconclusive where all of the evidence indicated that the Defendant had consumed a small quantity of 3.2% beer. Furthermore, the instruction that a person is intoxicated where his capacity to drive is impaired in the slight-

[12] C.B.A. Ad. Sh. Vol. X, Pg. 354, 1955.

est degree, was disapproved in a case such as that at bar pertaining to 3.2% beer. 4-3 Decision.

The above opinion was published May 9, 1955; however, it was superseded by a new opinion published July 25, 1955, in which the Court reached a contrary conclusion holding that the evidence was sufficient and that the instructions were proper.

SURVIVOR STATUTE

Ofstad vs. Sarconi[13]

Where the testimony of the proponent of a will and that of the attorney who drafted the will is in conflict as a result of the attorney testifying that the proponent had told him what to put in the will and a denial of this fact by the proponent, it was error for the Court to exclude the testimony of the proponent—the dead man statute being no bar to the admission of such testimony since an exception to that statute is present when an adverse party calls the witness and thus waives the bar.

WITNESSES—CROSS EXAMINATION

Ripple vs. Brack[14]

In a civil damage action it was error to allow counsel for Plaintiff to cross-examine the patrol officer concerning the plea entered by the Defendant in a criminal case tried before a justice of the peace. Such questions are immaterial in a civil action and are, of course, highly prejudicial.—*W. D.*

[13] C.B.A. Ad. Sh. Vol. VII, Pg. 375, No. 11, 1955.
[14] C.B.A. Ad. Sh. Vol. VII, Pg. 466, No. 12, 1955.

ONE YEAR REVIEW OF COLORADO CASES ON NEGOTIABLE INSTRUMENTS

By ARNOLD M. CHUTKOW *of the Denver Bar*

During the past year, the Supreme Court decided four cases dealing directly or indirectly with the Law of Negotiable Instruments. Two of these decisions, *American National Bank of Denver v. First National Bank of Denver, et al.*,[1] and *Harsin Motor Co. v. Colorado Savings & Trust Co., et al.*,[2] dealt directly with problems peculiar to the field of negotiable instruments.

In the *American National Bank* case, the plaintiff brought the action against the Hereford State Bank, the first endorsee on a check and against the First National Bank of Denver, an intermediate endorsee. The check in question was payable to two payees, but was negotiated to the defendant, Hereford bearing the endorsement of only one. Hereford endorsed to a bank in Cheyenne, Wyoming which in turn endorsed to the defendant, the First National Bank of Denver, which presented check to the drawee—plaintiff. The drawer objected to the payment because of the missing endorsement and the plaintiff reimbursed the drawer's account and instituted the action to recover the amount paid on the check.

The action was based upon two theories, one stemming from the Negotriable Instruments Law and the other stemming from the doctrine of payment under mutual mistake of fact, i.e. that all endorsements necessary were not properly on the instrument. The Supreme Court affirmed a dismissal as to the First National Bank, but reversed with respect to a dismissal on the second theory as to the Hereford State Bank.

Reasoning that since the instrument was not properly endorsed by both payees, the Court concluded that the Negotiable Instruments Law was not applicable since the instrument was not negotiable because of the missing endorsement. Apparently basing its decision on quaisi-contractual notions, the Court reversed the dismissal as to Hereford, stating:

> "The present action must be based upon an obligation on Hereford's part to reimburse plaintiff for monies in its possession to which it is not legally entitled."

No explanation was offered for affirming the dismissal as to the First National Bank of Denver. Perhaps it may be assumed that the affirmance of this dismissal was based on the desire to avoid circuity of actions. Nevertheless, the case does stand for the proposition that the first endorsee in the chain of titles who takes an instrument where the endorsement of one of a number of payees is missing, will be held liable in an action by the drawee to recover payments made on the instrument.

In the case of *Harsin Motor Co. v. Colorado Savings & Trust Co., et al.*, the drawer issued a check payable to "Barne's Used Cars" in payment of a car which was purchased. The findings of the trial

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[1] __ Colo. __, 277 P. 2d 235.
[2] __ Colo. __, 284 P. 2d 235.

court were to the effect that one Rickerson, offered to sell Harsin a 1951 Chevrolet automobile, advising Harsin that the title to the car was in the name of "Barnes Used Cars"; that the certificate of title was in the possession of one Zipprodt. Harsin, before completing the purchase, telephoned the manager of Zipprodt, a finance company, who was a third party defendant, and verified that Zipprodt held the certificate of title to the 1951 automobile. Harsin, desiring to make payment to the owner of the car, executed his check payable to Barnes Used Cars, though Rickerson had asked Harsin to make him the payee, which Harsin declined to do. It appeared at the time that Rickerson owed the finance company the sum of $500.00 and that Zipprodt, the finance company, was holding a certificate of title to the automobile. Zipprodt did not have a chattel mortgage on the car. Rickerson then took the check ot the finance company and endorsed it in the presence of the finance company as follows:

> Barnes Used Cars—Charles Barnes—James H. Rickerson.

It was later ascertained that the automobile had been stolen and it was repossessed by the rightful owner, whereupon the plaintill informed the bank that the endorsement on the check was a forgery and demanded that the bank credit his account. The bank did this but later withdrew the credit it had given.

The named payee was actually an existing person, doing business in Ordway, Colorado. Rickerson had assumed the name, although the payee had nothing to do with the transaction, apparently for the purpose of avoiding a violation of the statute requiring a person dealing with used cars to have a license.

The trial court dismissed the action against all defendants. It should be noted that the action was basically a contest between the drawer and the drawee of the check. The question was one of whether or not a forgery had been committed when the payee's name was endorsed by Rickerson. Resolution of the question of whether or not a forgery had been committed depended on the intent of the drawer in making the check payable to "Barnes Used Cars".

The Court drew a distinction between the situation where a check is drawn payable directly to the imposter acting under an assumed name and the situation where the check, as in the present case, is drawn and delivered to the imposter, unpon the representation that the latter is the agent of the payee, even though the payee is fictitious or non-existent. In the former case, it is generally held that the drawer's intent is to make the check payable to the person physically present before him, regardless of the name assumed or employed by the person. On the other hand, if the intent was not to make the check payable to the person physically present before the drawer, but to his principal, whether there was such a principal or not, an endorsement by the importer, may constitute a forgery. If it is a forgery, of course, the drawee may not charge the account of the drawer.

The Court accordingly reversed and remanded with instructions to vacate the order of dismissal, and to proceed with a trial on the merits. It was the opinion of the Court, that inasmuch as a forgery may have been committeed, the facts should be presented before any determination of the issue was made.

In the case of *Wysowatcky, Guardian v. Denver-Willys, Inc.*[3] the problem was that of where an indorsee takes a negotiable instrument from a fiduciary who cashes the check in payment of a personal debt or for his personal benefit. It was contended by the plaintiff-in-error that if the endorser knows that the endorser is a fiduciary, the former is put upon notice of the breach of trust of the endorser and must make inquiries so as to determine the correct facts.

The Court, however, applied the language of the Uniform Fiduciaries Act[4] and held that inasmuch as there was no evidence that the negotiation of the check amounted to a breach of a fiduciary obligation, and more important, no evidence that the indorsee had actual knowledge of the breach of the obligation, the indorsee was not liable to the principal of the fiduciary.

In the case of *Hubby v. Willis Agency, Inc.*,[5] it was held that a payee and holder of a Promisory Note may maintain an action thereon, even though he is not the beneficial owner of the instrument upon which suit is brought. Thus, even though the payee only has naked legal title and is nominally the payee, the beneficial or equitable ownership being vested in another, or if payee and holder does not have the entire interest in the instrument, he may nevertheless maintain an action on it in his own name, regardless of any notions of real party in interest.

The cases decided by the Court on negotiable instruments are not many but it is believed that the first two, the *American National Bank* case and the *Harsin* case are interesting and involve directly problems peculiar to the field of negotiable instruments.—*A. C.*

[3] Colo. ___, 281 P. 2d 165.
[4] C.S.A. 1953, Chapter 57, Article 1, Section 4.
[5] ___ Colo. ___, 283 P. 2d 1080.

ONE YEAR REVIEW COLORADO WORKMEN'S COMPENSATION LAW

By WILLIAM H. HAZLITT *of the Denver Bar*

Only one decision involving workmen's compensation was handed down during the last year. That case reduces but does not eliminate uncertainty from compensation claims arising out of heart attacks, despite the Court's assertion that the law is settled. The case was *Industrial Commission et al. v. International Minerals and Chemical Corporation et al.*[1]

Gallegos was employed by International Minerals for one day. His job was to assist another employee in filling sacks with mica. The procedure was to place an empty sack on a scale and pull a lever which would release mica in a chute to fill the sack. No heavy work was involved. When he had weighed a few sacks, his co-worker's nephew came in and asked Gallegos to fix his car. Gallegos fixed the car and then helped push it some little distance to start it. When he returned to work, he found that his co-worker had loaded a hand truck with four sacks. Gallegos pushed the truck about thirty feet on a cement floor, dumped it, started back with the empty truck, collapsed and died of a coronary occlusion. He did not slip or have an accident of any kind. At the hearing before the Referee, the pathologist's autopsy report showing that death was a result of acute congestive heart failure and that excessive physical exertion probably induced the heart failure was placed in evidence. Gallegos' co-worker, the only eye-witness, testified that Gallegos did not have an unusual exertion on the job. There was evidence that Gallegos had a longstanding heart condition.

The Referee denied the claim because there was no history of accidental strain. This finding was vacated by the Commission which awarded compensation. The District Court set the award aside and the Supreme Court affirmed, saying it has consistently held that, in such cases, claimant must prove more than mere exertion but must establish over-exertion.

Going further, the Court commented that the evidence was undisputed that Gallegos over-exercised himself in pushing the automobile which he had repaired, an act outside the scope or course of employment. This is unfortunate and has the effect of

[1] C.B.A. Ad. Sh. Vol. 7, P. 498. Case No. 17712.

rendering uncertain an otherwise clearcut statement of the law. Despite the statement that over-exertion is essential to a claim for compensation for congestive heart failure, one wonders what the conclusion would have been had Gallegos remained on the job and, doing ordinary work, suffered the attack. If there had been no evidence of any exertion other than that involved in the ordinary work, might not the Court possibly have applied the rule that it applied in a previous heart case (*USF&G v. I. C.*[2]) "That an accident is a result, the causes of which are unexpected and unusual or that it may be also an unexpected and unusual result from ordinary causes." We are still not sure that over-exertion is a sine qua non.

There have been statutory changes increasing the award for burial expenses to $350.00, the maximum death benefit to $9,859.50, the temporary total disability benefit to $31.50 per week, the maximum facial disfigurement award to $1,000.00, the death payment to the "subsequent injury fund" (where there were no dependents of the deceased) to $1,250.00, the permanent partial disability maximum to $8,190.00, the lump sum maximum to $9,859.50, and adopting a new mortality table. Also of considerable interest is the new Medical, Surgical and Hospital Fee Schedule which became effective August 1, 1955 and which reflects the general rise in the cost of living.—*W. H.*

96 Colo. 571.

THE RIGHT TO REPRESENTATION BY COUNSEL UNDER THE FOURTEENTH AMENDMENT

HAROLD E. HURST
Professor, Univ. of Denver College of Law

The right of an accused in state criminal proceedings to be represented by counsel has frequently been claimed as a necessary element of the fair hearing inherent in due process of law required of the states by the Fourteenth Amendment.

The right to be represented by counsel in federal criminal proceedings is guaranteed by the Sixth Amendment but no specific mention of the right to counsel in state proceedings is to be found in the Constitution. The Court has consistently refused to rule that the procedural protections of the Bill of Rights are a catalogue of rights protected by the Fourteenth Amendment against state encroachment.[1] And so, as might be expected, the Court has adamantly refused to hold that representation by counsel in criminal proceedings is a fixed and specific requirement of due process. Rather, due process or the lack of it depends upon whether in the judgment of the Court the proceeding is characterized by fairness —or the lack of it. The principle has found expression in the following language:

> The Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.[2]

And to bolster its judgment in the matter, the Court has tabulated provisions of state constitutions and statutes, concluding that a majority of the states appeared not to consider representation by counsel fundamental to a fair trial in all situations.

What, then, is a fair trial in which the defendant is not represented by counsel? The following sections indicate the conditions and circumstances which may run so contrary to the Court's collective sense of fair play as to result in violation of the Fourteenth Amendment.

Illiteracy, Youth, Ignorance, Intelligence of the Defendendant

There is a clear relationship in the Court's mind between a defendant's capacity to prepare and present a defense and the fairness of a criminal proceeding against the defendant without coun-

[1] Twining v. New Jersey, 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908); Adamson v. California, 332 U.S. 46 67 S. Ct. 1672, 91 L. Ed. 1903 (1947); Wolf v. Colorado 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949); Irvine v. California, 347 U.S. 128, 74 S. Ct. 381, 98 L. Ed. 324 (1954).
[2] Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942).

sel. The Court has frequently drawn the inference[3] that defendants who were young, ignorant, illiterate and inexperienced were not capable of making a defense, and has declared that to put such individuals on trial without counsel is fundamentally unfair and consequently is not due process.

Paradoxical though it be, the burden of establishing the incapacity or inability of a defendant to obtain a fair hearing without counsel falls upon the defendant himself. Obviously, cases involving the question usually come into a lawyer's hands only after trial and conviction of the defendant. The lawyer's decision whether to raise the issue of unfairness because of lack of counsel requires a careful study of the pretrial and trial proceedings and an investigation of the personal characteristics of the defendant, because the factors which indicate lack of capacity to defend—youth, illiteracy, inexperience, mental deficiency—are matters of degree and exist in different combinations.

Trial of one incapable of defending himself adequately without counsel may not be considered "offensive to the common and fundamental ideas of fairness and right" if counsel is provided in time to raise the question of the fairness of the proceeding, or if the court adequately safeguards the defendant from prejudicial error.[4]

[3] In the following cases convictions have ben reversed or remanded to determine the truth of the allegations of persons seeking release on the grounds that trial without counsel was unfair: Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932); House v. Mayo, 324 U.S. 42, 65 S. Ct. 989, 89 L. Ed. 1367 (1945); Wad v. Mayo, 334 U.S. 672, 68 S. Ct. 1270, 92 L. Ed. 1647 (1948); DeMeerleer v. Michigan, 329 U.S. 633, 67 S. Ct. 596, 91 L. Ed. 584 (1947); Uveges v. Pennsylvania, 335 U.S. 437, 69 S. Ct. 184, 93 L. Ed. 127 (1948); Palmer v. Ashe, 342 U.S. 142, 72 S. Ct. 191, 96 L. Ed. 154 (1951); Reece v. Georgia, — U.S. —, 76 S. Ct. 167, — L. Ed. (1955); Massey v. Moore 348 U.S. 105 75 S. Ct. 145, 99 L. Ed. 134 (1954); Chandler v. Fretag, 348 U.S. 3, 75 S. Ct. 1, 99 L. Ed. 4 (1954).

The Court has refused to reverse convictions in: Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942) Gayes v. New York, 332 U.S. 145, 67 S. Ct. 1711, 91 L. Ed. 1962 (1947); Bute v. Illinois, 333 U.S. 640, 68 S. Ct. 763, 92 L. Ed. 986 (1948); Gryger v. Burke, 334 U.S. 728, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948); Quicksall v. Michigan 339 U.S. 660, 70 S. Ct. 910, 94 L. Ed. 1188 (1950); Gallegos v. Nebraska, 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed. 86 (1951).

[4] Counsel appointed in time to object to prejudicial errors: Canizio v. New York, 327 U.S. 82, 66 S. Ct. 452, 90 L. Ed. 545 (1946); Gallegos v. Nebraska, 342 U.S. 55, 72 S. Ct. 141, 96 L. Ed. 99 (1951); Avery v. Alabama, 308 U.S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1940). Cf. Reese v. Georgia, U.S. —, 76 S. Ct. 167, L. Ed. (1955).

Rights of the defendant adequately protected by the trial judge: Carter v. Illinois, 329 U.S. 173, 67 S. Ct. 216, 91 L. Ed 172 (1946); Foster v. Illinois, 332 U.S. 134, 67 S. Ct. 1716, 91 L. Ed. 1955 (1947); Quicksall v. Michigan, 339 U.S. 660, 70 S. Ct. 910, 94 L. Ed. 1188 (1950).

COMPLEXITIES OF CHARGE—TECHNICALITIES OF DEFENSE

Although an accused appears in all respects to be of normal intelligence and experience, conviction without the assistance of counsel (unless intelligently waived) may be a deprivation of liberty without due process of law where close technical distinctions between the degrees of crime and available defenses present complex problems in the presentation of evidence and instructions to the jury. The Supreme Court has reversed convictions where the offense charge was distinguishable from other lesser crimes only by technical differences in the evidence required to convict, different instructions to the jury, and availability of different defenses, the Court saying that such complexities "are a closed book to the average layman."[5] The Court considers such trials unfair.[6]

Although no such cases have come before the Supreme Court, it is reasonable to expect that the Court would hold representation by counsel to be necessary to a fair hearing before an administrative tribunal or a court in a civil matter where the issues are complex and the proof difficult. For instance, matters such as the public convenience and necessity or the compensability of an industrial injury and the extent of the disability are a "closed book to the average layman." The applicant for a truck licensing permit or the injured workman seeking workman's compensation, appearing without a lawyer or other expert representative because he is unaware of the pitfalls ahead, would seem to be placing his rights in danger unfairly unless the tribunal concerned itself affirmatively in the protection of such rights in the absence of counsel.

OPPORTUNITY OF COUNSEL TO PREPARE—EFFECTIVE COUNSEL

The fair hearing required by due process of law includes an opportunity to prepare and present such defenses as may be available. It would seem to follow that appointment of counsel at such a time as to make it impossible for him to prepare for trial likewise deprives those defendants of liberty without due process who need counsel because of incapacity. This view of requirement of due process seems to have been applied by the Court in the few cases presenting the issue.[7]

It would seem also, although there are no state cases reversing convictions on that ground, that trial of a defendant who needs counsel but who is represented by counsel so obviously negligent or incompetent as to be of no assistance is inconsistent with the constitutional guarantee of a fair trial. If appointment of counsel at such *time* as to render his assistance valueless does not satisfy

[5] Williams v. Kaiser, 323 U.S. 471, 65 S. Ct 363, 89 L. Ed. 398 (1945).

[6] Tomkins v. Missouri, 323 U.S. 485, 65 S. Ct. 370, 89 L. Ed. 407 (1945); Rice v. Olson 324 U.S. 786, 65 S. Ct 989, 89 L. Ed. 1367 (1945); Hawk v. Olson, 326 U.S. 271, 66 S. Ct. 116, 90 L. Ed. 61 (1945); Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948). Cf. Betts v. Brady, 316 U S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942); Gryger v. Burke ,334 U.S. 728,, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948).

[7] Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.l R. 527 (1932); Hawk v. Olson, 326 U.S. 271, 66 S. Ct. 116, 90 L. Ed 61 (1945); White v. Ragen, 324 U.S. 760, 65 S. St. 978, 89 L. Ed. 1348 (1945); Reece v. Georgia, .. U.S. ...., 76 S. Ct. 167, ... L. Ed .... (1955). Cf. Avery v. Alabama, 308 U.S. 444, 60 S. Ct 321, 84 L. Ed. 377 (1940); Canizio v. New York, 327 U.S. 82, 66 S. Ct. 452, 90 L. Ed. 545 (1946); Strable v. California, 343 U.S 181, 72 S. Ct. 599, 96 L. Ed. 872 (1952); Michel v. Louisiana, ... U.S. ...., 76 S Ct. 167, ... L. Ed. .... (1955).

due process, then neither does the appointment of counsel of such *kind* as to render his assistance valueless.[8]

CONDUCT OF THE POLICE OR PROSECUTOR

Aside from coercing confessions from defendants, police or prosecutors frequently obtain convictions or pleas of guilty by deception practiced upon a defendant who is without counsel. Some trials are unfair because a defendant who needs counsel is not provided with counsel.[9] It goes without saying that such a trial is even more repugnant to the requirements of due process if the defendant is also the victim of deception or misrepresentation. Such is clearly the view of the Supreme Court.[10] Similarly, although the degree of unfairness is lesser, it appears to be a violation of the Fourteenth Amendment for the police or prosecutor to practice deception and misrepresentation on a defendant who might otherwise have been considered capable of presenting his defense without counsel.[11]

The logic of due process, which is the rule of fairness when procedure is being considered, also appears in those cases which the Court has refused to reverse. There would seem to be no particular unfairness in a conviction resulting from a proceeding in which deception, misrepresentation or "deals," promising the dropping of other charges or a lighter sentence in return for a plea of guilty, are perpetrated upon a defendant without counsel, if the defendant is afforded counsel in time to raise objections to the procedure and otherwise to protect the defendant's rights.[12]

[8] This issue might well have been raised in Powell v. Alabama, Hawk v. Olson, and White v. Ragen (see note 7 above), in which the Court declared a failure of a fair trial where defendants were denied "effective aid and assistance" of counsel. From the circumstances as reported, however, it appears that the Court may have been indulgent toward counsel since the lack of effective aid and assistance" seemed at least in part the result of inefficient or inattentive counsel, rather than of lack of time to prepare. The issue was specifically raised and decided against the defendant in Poret et al. v. Louisiana, ... U.S ...., 76 S. Ct. 158, ... L. Ed. .... (1955).

[9] Supra.

[10] Uveges v. Pennsylvania, 335 U.S. 437, 69 S. Ct. 184, 93 L. Ed. 127 (1948); Palmer v. Ashe, 342 U S. 142, 72 S. Ct. 191, 96 L. Ed. 154 (1951).

[11] Smith v. O'Grady, 312 U.S. 329, 61 S. Ct. 572, 85 L. Ed. 859 (1941), wherein the defendant, told he was charged with burglary but prevented from seeing the indictments, and told he would receive a sentence of not over three years if he would plead guilty, found later that he would plead guilty, found later that he had actually pleaded guilty to a more serious charge with a mandatory minimum sentence of 20 years.

[12] Canizio v. New York, 327 U.S. 82, 66 S. Ct 452, 90 L. Ed. 545 (1946); Gallegos v. Nebraska, 342 U.S. 55, 72 S. Ct. 141, 96 L. Ed. 86 (1951); Stroble v. California, 343 U.S. 181, 72 S. Ct 599, 96 L. Ed. 872 (1952).

CONDUCT OF TRIAL

The trial judge is the key figure in any proceeding wherein a person's life, liberty or property is affected. The fairness of the proceeding is primarily the responsibility of the judge. Even when trial of a defendant without counsel would not necessarily be a violation of the constitutional right to due process, the deportment of the trial judge or the manner of conducting the trial may nevertheless be so prejudicial as to render the trial unfair. Substantial prejudice may arise in many ways—the admission of incompetent or prejudicial evidence, exclusion of material evidence favorable to the defendant, improper remarks by the judge or prosecutor in the presence of the jury, intimidation of the defendant to plead guilty, misrepresentation in explaining the charge to the defendant. The bounds of ordinary decency would seem to have been exceeded in any trial without counsel in which such practices were permitted, and so seems the Court to look upon the matter.[13]

Where a defendant is not incapable of providing an adequate defense and the trial court properly advises the defendant, failure to offer appointed counsel is not a denial of the right to a fair trial. Three cases are noted[14] in which the trial judge explained to the defendants the consequences of a plea of guilty, the right to counsel, the right to a jury trial and the degree of proof which would be required to convict, but in which the defendants nevertheless elected to plead guilty. All three cases were affirmed when the defendants sought release on the ground of lack of counsel and denial of a fair hearing. Here, it would seem, the judge has done all that counsel could do to safeguard the rights of the defendant, and the defendant, having been made aware of his rights and the difficulties ahead, has intelligently waived his right to counsel. It is clear that a defendant who is capable of understanding the nature and significance of the proceeding can waive his right to be represented by counsel.[15]

SERIOUSNESS OF THE OFFENSE

The seriousness of the offense with which the defendant is charged—whether the penalty be capital punishment or imprisonment—is of little consequence in determining if counsel must be appointed. Although there appear in the cases statements that indicate a disposition on the part of the Court to require the appointment of counsel in capital cases, the actual reason for the decisions appears to be the requirement that in any case—capital or otherwise—the proceeding be fair in the sense that a defendant who is without counsel be intelligent and experienced enough to defend himself adequately or to waive counsel intelligently, taking into

[13] House v. Mayo, 324 U.S. 42, 65 S. Ct. 517, 89 L. Ed. 739 (1945); Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed 1690 (1948); Gibbs v. Burke, 337 U.S. 773, 69 S. Ct. 1247, 93 L. Ed. 1686 (1949); In re Oliver, 333 U.S. U.S. 257, 68 S. Ct. 499, 92 L. Ed 682 (1948).

[14] Carter v. Illinois, 329 U.S. 173, 67 S. Ct. 216, 91 L Ed. 172 1946); Foster v. Illinois, 332 U.S. 134, 67 S. Ct. 1716, 91 L. Ed. 1955 (1947); Quicksall v. Michigan, 339 U.S. 660, 70 S Ct. 910, 94 L. Ed. 1188 (1950).

[15] Gryger v. Burke, 334 U.S 728, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948) and cases cited in footnote 14 above. See also Poret et al. v. Louisiana ,... U.S. ...., 76 S. Ct. 158, ... L. Ed. ...., (1955), in which the defendant, in his flight to avoid apprehension, was deemed to have waived his right to counsel for the purpose of attacking the validity of the indictment, time for which attack expired while defendant was a fugitive in another state.

consideration the complexity of the issues and the conduct of the investigation and trial. In *Powell v. Alabama,*[16] a capital case, the Court said, "All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . ." Four other cases have reached the Supreme Court in which defendants were on trial for capital offenses and did not have counsel. In three of them[17] the Court reversed state court dismissals of petitions for habeas corpus on the authority of *Powell v. Alabama,* interpreting the Alabama case to mean that "at least in capital offenses" where the defendant is incapable of making an adequate defense there must be representation by counsel. The emphasis in each case is upon the incapacity of the defendant rather than upon the seriousness of the offense. In the fourth case,[18] the rights of the defendant to have a lawyer, the degree of proof necessary to convict, the right to trial by jury, and the consequences of a plea of guilty were explained by the trial judge to the defendant who nevertheless elected to plead guilt. In this capital case, where the trial judge took great pains, short of actual appointment of counsel, to avoid any unfairness or prejudice, the conviction was affirmed.

No case has as yet reached the Court on the right to counsel issue wherein a defendant, on trial for a capital offense, and not shown to be incapable of representing himself, elected to stand trial without the aid of counsel and was convicted. Since the basic consideration in right to counsel cases is the fairness of the proceeding, taking into account all the circumstances, it seems unlikely that the Supreme Court would require the appointment of counsel in such a case solely because the offense charged threatened capital punishment. The Court has refused to reverse con-

[16] 287 U.S. 45, 53 S Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932).

[17] Williams v. Kaiser, 323 U.S. 471, 65 S. Ct. 363, 89 L. Ed. 398 (1945); Tomkins v. Missouri, 323 U.S. 485, 65 S. Ct. 370, 89 L Ed. 407 (1945); Hawk v. Olson, 326 U.S. 271, 66 S. Ct. 116, 90 L. Ed. 61 (1945).

[18] Carter v. Illinois, 329 U.S. 173, 67 S. Ct. 216, 91 L. Ed. 172 (1946)

victions in noncapital cases wherein the defendant intelligently elected to stand trial and make his own defense.

Furthermore, the consideration of fairness of the proceeding runs through noncapital state felony cases as the basis for decision, rather than the seriousness of the offense. Typical lauguage appears in *Palmer v. Ashe.*[19] "This Court has repeatedly held that the Due Process Clause of the Fourteenth Amendment requires states to afford defendants assistance of counsel in noncapital criminal cases when there are special circumstances showing that without a lawyer a defendant could not have an adequate and fair defense."

Convictions without counsel have been reversed or remanded wherein the charge was burglary,[20] robbery,[21] larceny,[22] and confidence game.[23] In no case has the Court placed its refusal to consider a proceeding violative of the Fourteenth Amendment on the ground that the offense charged was not serious or that such offense was a misdemeanor as distinguished from a felony. It could with reasonable safety be ventured that any conviction, regardless of the nature of the charge or the seriousness of the punishment, will be reversed where it can be shown "that without a lawyer a defendant could not have an adequate and fair defense."[24]—*H. H.*

[19] 342 U.S. 142, 72 S. Ct. 191, 96 L. Ed. 154 (1951); see also Bute v. Illinois, 333 U S. 640, 68 S. Ct. 763, 92 L. Ed. 986 (1948); Gallegos v. Nebraska, 342 U.S. 55, 72 S Ct. 141, 96 L. Ed. 99 (1951); Massey v. Moore, 348 U.S. 105, 75 S. Ct. 145, 99 L. Ed. 135 (1954)

[20] Smith v. O'Grady, 312 U.S. 329, 61 S. Ct. 572, 85 L. Ed. 859 (1941); House v Mayo, 324 U.S. 42, 65 S. Ct. 517, 89 L. Ed. 739 (1945); Rive v. Olson, 324 U S. 786, 65 S. Ct. 989, 89 L. Ed. 1367 (1945); Wade v. Mayo, 334 U.S. 672, 68 S. Ct. 1270, 92 L. Ed. 1647 (1948); Uveges v Pennsylvania, 335 U.S. 437, 69 S. Ct. 184, 93 L. Ed. 127 (1948).

[21] Townsend v Burke, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948); Palmer v. Ashe, 342 6.S. 142, 72 S. Ct. 191, 96 L. Ed. 154 (1951); Massey v. Moore, 348 U.S. 105, 75 S. Ct. 145, 99 L. Ed. 135 (1954).

[22] Gibbs v Burke, 337 U.S. 773, 69 S. Ct. 1247, 93 L. Ed. 1686.

[23] White v. Ragen, 324 U.S. 760, 65 S. Ct. 978, 89 L. Ed. 1348.

[24] Palmer v. Ashe, 342 U.S. 142, 72 S. Ct. 191, 96 L. Ed 154 (1951).

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ARNOLD M. CHUTKOW, Editor

NOTES AND COMMENTS

Evidence: Admissibility of Evidence Obtained Through Illegal Searches and Seizures

By James F. Culver, *Student, University of Denver, College of Law.*

A recently decided California case would seem worthy of notice among members of the legal profession in Colorado, since upon facts very similar to those of a leading Colorado case the Supreme Court of California, after extensive consideration of the Colorado case, arrived at a contrary result.

The California decision referred to is *People v. Cahan,*[1] which was decided April 27, 1955, and which by a four to three majority reversed a lower court conviction of Cahan and other defendants charged with conspiring to engage in horse-race bookmaking and related offenses. Most of the evidence introduced at the trial was obtained by police officers in violation of the United States Constitutional guarantees against unreasonable searches and seizures.

With permission of the Chief of the Los Angeles Police Department and without further authority, officers of that Department surreptitiously entered two houses and installed listening devices therein by means of which the officers were able to make recordings of all audible activities transpiring within the houses. The officers in question purported to act under Sec. 653h of the California Penal Code which provides as follows:

> Any person who, without consent of the owner, lessee, or occupant, installs or attempts to install or use a dictograph in any house, room, apartment, tenement, office, shop, warehouse, store, mill, barn, stable, or other building, tent, vessel, railroad car, vehicle, mine or any underground portion thereof, is guilty of a misdemeanor; provided that nothing herein shall prevent the use and installation of dictographs by a regular salaried peace officer expressly authorized thereto by the head of his office or department or by a district attorney when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals.

Furthermore, numerous forcible entries and seizures were candidly admitted at the trial by the officers as the means whereby additional evidence tending to establish the guilt of defendants was obtained.

The central question in the case was whether or not evidence illegally obtained by state officers is admissable in a state court against defendants on trial for violations of state criminal laws.

Mr. Justice Traynor, writing for the majority of the Court, disposed of the prosecution's claim that the California Penal Code authorized the acts of the police officers by commenting as follows: "Sec. 653h of the Penal Code does not and could not authorize

[1] 282 P. 2d 905, ... Calif.

violations of the Constitution, and the proviso under which the officers purported to act at most prevents their conduct from constituting a violation of that section itself."

In a well-reasoned and extremely persuasive opinion, Mr. Justice Traynor further concluded that evidence obtained in violation of constitutional guarantees against unreasonable searches and seizures was inadmissable in the prosecution of defendants for the violation of state laws.

The Colorado case referred to as being similar on its facts but in which the Colorado Supreme Court reached a contrary result is *Wolf v. People.*[2]

In the Wolf case, representatives of the district attorney's office, having no information concerning an abortion on one Mildred Cairo, but possessed of information concerning a similar one committed on another woman and the connection of defendant Wolfe therewith, went to Wolfe's office without a warrant of any kind and took him into custody and at the same time confiscated and removed from his office certain records of patients who consulted Wolfe professionally, which records were subsequently used as evidence in Wolfe's trial on charges of having committed a criminal abortion on Mildred Cairo.

The Colorado Supreme Court upheld Wolfe's conviction, saying that the point is well-settled in Colorado that evidence obtained by means of unreasonable searches and seizures is admissable in a prosecution in a state court for a state crime.

The Wolfe decision was considered by the United States Supreme Court in 1949, and that Court refused to disturb the ruling of the Colorado Supreme Court, Mr. Justice Frankfurter declaring that in a prosecution in a state court for a state crime the 14th Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.[3]

The Wolfe decision, of course, follows the traditional common law doctrine that the fact that evidence was illegally obtained is not a ground for exclusion. A slight majority of the states, even today, adhere to this doctrine.[4]

[2] 117 Colo. 279, 187 P. 2d, 926.
[3] Wolf v. Colorado, 338 U.S. 25 (1949).
[4] McCormick on Evidence 291 (1954).

On the other hand, the Federal rule, or so-called "Weeks doctrine," is that in a federal prosecution the 4th Amendment bars the use of evidence secured through an illegal search and seizure.[5]

It is interesting to note that prior to *People v. Cahan* supra, the rule that illegally obtained evidence was admissable in state courts was equally if not more firmly established in California than it is in Colorado today.[6] Not only was the non-exclusionary rule well-settled in California, but furthermore, the rule of the Wolf case that the 14th Amendment does not require the exclusion of evidence obtained by an unreasonable search and seizure was reaffirmed by the United States Supreme Court in disposing of a California case just the year before the decision in the Cahan case.[7] However, in doing so Mr. Justice Clark of the United States Supreme Court declared, "Perhaps strict adherence to the tenor of (the Wolf) decision may produce needed converts for its extinction."[8]

Even before the Cahan decision more than two-fifths of the states had aligned themselves either by decision or by legislation, in general agreement with the Weeks doctrine of excluding evidence secured in violation of constitutional guarantees against unreasonable searches and seizures.[9] A total of twenty states are today in general accord with the Weeks doctrine: California, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Michigan, Mississippi, Missouri, Montana, North Carolina, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin, and Wyoming.[10]

When Mr. Justice Clark declared in the Irvine case, supra, that strict adherence to the tenor of the Wolf decision might perhaps produce needed converts for its extinction, it may very well be that the learned justice did not anticipate such prompt conversion as that demonstrated by the Supreme Court of California in the Cahan case. Nevertheless, as Professor McCormick has put it, "the tide seems to be flowing in that direction."[11] Under the circumstances and in light of the Cahan case, who can say that the non-exclusionary rule is so well settled in Colorado that our Supreme Court may not one day in the foreseeable future reexamine its present position on the question and itself join the ranks of those "needed converts" for the extinction of the Wolf decision?

[5] Weeks v. U.S., 232 U.S., 383 (1914).
[6] People v. Le Doux, 155 Cal. 535, 102 P. 517 (1909); People v. Mayen, 188 Cal. 237, 205 P. 435. 24 A.L.R. 1383 (1922); People v. Gonzales, 20 Cal. 2d. 165, 124 P. 2d. 44 (1942); People v. Kelley, 22 Cal. 2d 169, 137 P2d 1 (1943); and People v. Haeussler, 41 Cal. 2d 252, 260 P2d 8 (1953).
[7] Irvine v. People of Calif., 347 U.S. 128 (1954).
[8] Ibid.
[9] McCormick on Evidence 295 (1954).
[10] Wolf v. Colorado, 338 U.S. 25 (1949); McCormick on Evidence 295 (1954); People v. Cahan, Calif., 282 P 2d. 905 (1955).
[11] McCormick on Evidence 295 (1954).